STATE OF MICHIGAN

COURT OF APPEALS

VICKY ANN HOTCHKISS,

Plaintiff-Appellant,

v

MARK R. MITCHELL, and MARK R. MITCHELL, P.C.,

Defendants-Appellees.

UNPUBLISHED
October 24, 2006

No. 270143
Wexford Circuit Court
LC No. 05-019341-NM

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff Vicky Ann Hotchkiss appeals as of right from the circuit court's order granting defendants Mark R. Mitchell and Mark R. Mitchell, P.C., (collectively, Mitchell) summary disposition under MCR 2.116(C)(7). We affirm.

I. Basic Facts And Procedural History

In early December 2001, Hotchkiss retained Mitchell to represent her during her divorce from her then husband, James H. Olofson. On December 11, 2001, Hotchkiss and Mitchell executed a retainer contract, which Mitchell prepared. Mitchell formally entered his appearance in the divorce proceedings with the Wexford Circuit Court on that same date. The circuit court entered a consent judgment of divorce on June 20, 2002. On July 30, 2002, Mitchell sent Hotchkiss written notice that he was closing her file.

On or about November 25, 2002, Hotchkiss contacted Mitchell after discovering that Olofson had allegedly received retroactive disability benefits from the United States Department of Veteran Affairs (the VA) in the total amount of $258,188.16, which included "extra benefits" for Olofson's spouse, which at all pertinent times was Hotchkiss.

Hotchkiss and Mitchell executed a second retainer contract in late November or early December 2002, to "represent [Hotchkiss] concerning assisting [her] with post judgment divorce motions and/or discovery[.]" The second retainer contract had an express effective date of December 11, 2001.

In February 2003, the circuit court entered a post-judgment order allowing Mitchell to conduct formal discovery of information pertaining to the retroactive VA award. Following such

discovery, Mitchell filed a motion for relief from judgment in the divorce action. The circuit court denied the motion on November 12, 2003. Thereafter, the circuit court granted Olofson attorney fees. Mitchell's legal services were discontinued and terminated on March 26, 2004. On that same day, the circuit court approved Hotchkiss' motion for substitution of counsel.

On December 15, 2005, Hotchkiss filed this legal malpractice action against Mitchell. Hotchkiss alleged that, despite her repeated requests during the divorce proceedings, with the exception of filing a single subpoena duces tecum, Mitchell failed to conduct discovery regarding Olofson's disability benefits. Further, Hotchkiss asserted, Mitchell failed to follow through on the information gained from the VA as a result of the subpoena.

In lieu of an answer, Mitchell moved for summary disposition, arguing, in pertinent part, that Hotchkiss' complaint was barred by the applicable statute of limitations. Mitchell argued that he was entitled to summary disposition for his "initial" representation of Hotchkiss, which began on December 11, 2001, and ended no later than July 30, 2002, when he closed the file. Mitchell pointed out that the first retainer contract specifically provided that any additional work beyond resolution of the divorce action would require a new retainer contract. He contended that the second retainer contract began a new relationship for work on the post-judgment motions. Therefore, Mitchell argued, Hotchkiss' complaint was untimely, having been filed more than two after the last date of the first period of representation.

Hotchkiss responded, arguing that both she and Mitchell understood that the second retainer contract had the effect of rendering Mitchell's representation of Hotchkiss continuous from December 11, 2001, to March 2004. According to Hotchkiss, she hired Mitchell "to represent her legal interests in obtaining her marital share of Mr. Olofson's VA disability benefit[.]" Hotchkiss also relied on an August 21, 2003, affidavit in which Mitchell stated that he "was retained by Plaintiff to represent her *in this matter* on December 11, 2001."[1] She argued that this statement supported her position that Mitchell understood that the two representations periods were simply a continuation of representation regarding the same matter.

After hearing the parties' oral arguments, the circuit court pointed out that the parties entered the original retainer contract for the purpose of finalizing the divorce matter, which was done upon entry of the divorce judgment. The parties entered the second retainer contract, the circuit court explained, for the purpose of conducting discovery into the disability benefits and consideration of whether the divorce action should be reopened. The circuit court found it significant that "there was nothing in the divorce judgment as to the . . . VA issue. It was not an issue that was left undone in the divorce judgment. It was something that came up some five, six months later." The circuit court also found it significant that the original retainer contract did not include representation for post-judgment matters and that Mitchell gave Hotchkiss written notice that he was closing the file because the divorce action was resolved. Accordingly, the circuit court held that summary disposition was proper based on the two-year period of limitations applicable to legal malpractice actions.

---

[1] Emphasis added.

Hotchkiss moved for reconsideration, but the circuit court denied the motion. Thereafter, the circuit court entered its written, final order granting summary disposition in Mitchell's favor.[2]

II. Summary Disposition

A. Standard of Review

Hotchkiss argues that Mitchell's legal representation was continuous rather than two separate and distinct periods; therefore, she asserts, the statute of limitations had not run and summary disposition was inappropriate.

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. Neither party is required to file supportive material; any documentation that is provided to the trial court, however, must be admissible evidence.[3] The nonmoving party's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the nonmoving party's favor, unless contradicted by documentation submitted by the movant.[4] Absent disputed issues of fact, we review de novo whether the cause of action is barred by a statute of limitations.[5]

B. Statute of Limitations

This appeal requires us to determine whether, as the circuit court concluded, Mitchell's legal representation first ceased shortly after the court's entry of the consent judgment of divorce on June 20, 2002, and a new and separate representation relationship commenced in November 2002, or whether, as Hotchkiss contends, Mitchell's legal representation was continuous from December 2001 to March 2004.

A party may commence an action for legal malpractice at any time within two years after the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.[6] A claim of legal malpractice accrues at the time the lawyer discontinues serving the client in a professional capacity with respect to the matters out of

---

[2] Although Hotchkiss filed her claim of appeal before entry of the circuit court's final order, we accept Hotchkiss' claim of appeal as timely given that the defect was timely cured by filing of the final order twenty-one days after this Court sent notice of the defect.

[3] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[4] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[5] *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

[6] MCL 600.5805(6); MCL 600.5838(2); *Gebhardt v O'Rourke*, 444 Mich 535, 539, 541; 510 NW2d 900 (1994).

which the claim for malpractice arose.[7] Discovery is not at issue in this case—the dispute is over when Mitchell discontinued serving Hotchkiss.

The date that the lawyer discontinues serving the client is the last day he or she performs professional service on matters that form the predicate for the plaintiff-client's claim.[8] Examples of when a lawyer discontinues serving a client are when the client discharges the lawyer,[9] when the court discharges the lawyer,[10] when the lawyer completes the specific legal service he or she was retained to perform,[11] and when the client retains substitute counsel to assume responsibility for the matter the out of which the claim for malpractice arose.[12] Further, in the absence of any of the preceding occurrences, a lawyer discontinues serving a client when the lawyer sends notice of his or her withdrawal after the trial court's entry of the final order in the matter out of which the claim for malpractice arose.[13]

Here, the matter out of which Hotchkiss' claim of malpractice arose was the divorce action. Specifically, she alleged, in pertinent part, that Mitchell failed to make sure that the consent judgment reserved further consideration of possible VA benefits, failed to conduct meaningful discovery, failed to follow-up on correspondence received from the VA, and failed to follow up on conversations with Hotchkiss regarding the VA benefits. Accordingly, we must determine when Mitchell's representation in the divorce action ended.

Generally, a lawyer's representation in a divorce action concludes when the court enters the final judgment for divorce and the time for appeal has passed.[14] Here, the appeal period ended 21 days after entry of the consent judgment on June 20, 2002, or July 11, 2002. Thus, Mitchell's initial representation of Hotchkiss is presumed to have ended on July 11, 2002. Even absent this presumption, in no event did Mitchell's initial period of representation extend beyond the date on which he sent his notice of withdrawal, July 30, 2002.[15] However, we must consider whether this presumption is overcome by Mitchell's post-judgment representation, thereby extending the initial representation period for statute of limitations purposes.

---

[7] MCL 600.5838(1); *Gebhardt, supra* at 543, 544.

[8] *Gebhardt, supra* at 543.

[9] *Balcom v Zambon*, 254 Mich App 470, 484 (2002); *Hooper v Hill Lewis*, 191 Mich App 312, 315; 477 NW2d 114 429 (1991).

[10] *Balcom, supra* at 484; *Hooper, supra* at 315.

[11] *Balcom, supra* at 484; *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987).

[12] *Mitchell v Dougherty*, 249 Mich App 668, 684; 644 NW2d 391 (2002); *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994).

[13] *Kloian v Schwartz*, ___ Mich App ___; ___ NW2d ___ (2006).

[14] MCR 2.117(C)(1); *Ohlman v Ohlman*, 49 Mich App 366, 370; 212 NW2d 75 (1973).

[15] See *Kloian, supra*.

In ruling in Mitchell's favor, the trial court primarily relied on *Bauer v Ferriby & Houston, PC*, in which this Court addressed "whether an attorney's brief revisitation of an otherwise closed case in order to investigate and correct an alleged error attendant to the earlier representation has the effect of extending the previous representation for purposes of identifying when the applicable period of limitation for a malpractice action begins to run[.]"[16] According to this Court, this consideration rested "on the important distinction between an ongoing attorney-client relationship and a remedial effort concerning past representation."[17] This Court explained that public policy supported the need for a lawyer to stand ready "to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention."[18] However, this Court opined, "[t]o hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention."[19] Therefore, this Court concluded that "the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship."[20] After noting that the defendant-attorney did not bill the plaintiff for any of his follow-up efforts,[21] this Court held that the defendant's follow-up activities were "a response to a complaint about an earlier, terminated representation, not as legal service in furtherance of a continuing or renewed attorney-client relationship."[22] In sum, this Court held that the defendant's brief remedial service on an otherwise closed case, for which the defendant did not bill the plaintiff, did not extend the previous representation for statute of limitations purposes.

The present case is distinguishable from *Bauer*, however. Here, Mitchell's revisitation of Hotchkiss' divorce action was not brief, considering that the additional motions and rulings took over a year to complete. Further, Mitchell billed Hotchkiss for his additional services, as evidenced by the second retainer agreement. Indeed, because Mitchell billed her for the additional work, Hotchkiss argues that Mitchell's representation was continuous under the reasoning of *Maddox v Burlingame*. However, we also find *Maddox* distinguishable because in that case, where the lawyer was initially hired relative to the sale of a business, there is no indication that the lawyer was ever actually discharged before he rendered additional post-closing services. So, here, the question remains whether Mitchell's additional services were part of an ongoing attorney-client relationship or a separate remedial effort concerning past representation. We conclude that Mitchell's post-judgment services fall within the latter category.

---

[16] *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 537; 599 NW2d 493 (1999).

[17] *Id*. at 538.

[18] *Id*. at 539.

[19] *Id*.

[20] *Id*.

[21] See *Maddox*, *supra* at 451 ("[A]n attorney's act of sending a bill constitutes an acknowledgment by the attorney that the attorney was performing legal services for the client.").

[22] *Bauer*, *supra* at 540.

The first paragraph of the original retainer contract executed between Hotchkiss and Mitchell provided as follows:

> The Client employs Mark R. Mitchell, P.C. (Attorney) to represent the Client concerning *assisting the Client with a divorce from her husband* in the matter of Vicky A. Olofson v James H. Olofson, Wexford County Circuit Court File No. 01-16401-DO. Client agrees that this contract is limited to circuit court work and does not include appeals of any kind. *Any additional work would require another retainer contract* between Attorney and Client, contingent upon Attorney accepting such work.

Thus, Mitchell's initial representation was expressly limited to services related to effecting the divorce judgment. By agreement, "[a]ny additional work" beyond entry of the divorce judgment "require[d] another retainer contract." Accordingly, when Hotchkiss returned to Mitchell with her disability benefit allegations, they entered a second retainer contract, which provided as follows:

> The Client employs Mark R. Mitchell, P.C. (Attorney) to represent the Client concerning *assisting the Client with post judgment divorce motions and/or discovery* in the matter of Vicky A. Olofson v James H. Olofson, Wexford County Circuit Court File No. 01-16401-DO. Client believes that James H. Olofson may have failed to disclose information regarding financial benefits he expected to receive in the future during settlement negotiations and prior to entry of the divorce judgment in this matter.

As stated, the scope of this new and separate representation agreement was to assist Hotchkiss with post-judgment motions.

Once a lawyer has discontinued serving the client, additional acts by the lawyer will not delay or postpone the accrual of the claim regarding the matter out of which the malpractice arose.[23] Thus, Mitchell's representation of Hotchkiss subsequent to the divorce judgment constituted additional legal services that did not affect the accrual of her claims related to Mitchell's pre-judgment representation. As the trial court pointed out, Hotchkiss had no obligation to return to Mitchell to render post-judgment services. Because his representation for the purpose of her divorce action was complete, she could have retained new counsel to pursue the disability benefits issue. Further, there is no meaningful indication in the record to support Hotchkiss' position that the parties intended a continuous representation. We conclude that the trial court correctly held that Hotchkiss' claims for services rendered prior to July 2002, were barred by the two-year malpractice statute of limitations.

---

[23] See *Kloian, supra*.

C. Material Fact in Dispute

Hotchkiss argues that the circuit court erred in granting Mitchell summary disposition when disputes existed regarding material facts. However, Hotchkiss has failed to specifically identify any disputed material facts. It is insufficient for an appellant to merely announce her position and then leave it to this Court to discover and rationalize the basis for her argument, or unravel her arguments and then search for authority to support or reject her position.[24]

We add that, to the extent the disputed facts Hotchkiss claims are directly related to whether Mitchell's handling of the post-judgment motions constituted a continued or separate service, such disputes are questions of statutory construction and, thus, questions of law for the court.[25]

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski

[24] *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

[25] *Coddington v Robertson*, 160 Mich App 406, 410; 407 NW2d 666 (1987).